Supreme Court, U.S.
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No. 01-1666

In The Supreme Court of the United States

GARY VICTOR DUBIN and GREGG YOUNG,

Petitioners,

vs.

BANK OF HAWAII and JOHN CANDON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Notwithstanding the lengthy list of questions set forth in the Petition For Writ Of Certiorari, the Respondent believes that the Petition, at best, raises a single question:

Whether, under the particular facts of this case, the District Court abused its discretion in awarding and determining the amount of sanctions against the Petitioners pursuant to Fed. R. Civ. P. 11, arising from their filing of a frivolous complaint.

DISCLOSURE UNDER SUP.CT.R. 29.6

Respondent Bank of Hawaii is a Hawaii banking corporation with its principal place of business located in Honolulu, Hawaii. Bank of Hawaii's parent corporation is Bank of Hawaii Corporation, which owns all (or nearly all) of Bank of Hawaii's stock. No one other than Bank of Hawaii Corporation owns 10% or more of Bank of Hawaii's stock.

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I. COUNTERSTATEMENT OF THE CASE

As the Court of Appeals stated in its decision, which the Petitioners would have this Court review, the main issue in this case is "whether the district court judge abused his discretion in either the awarding of or the amount of Rule 11 sanctions" against Petitioners for having filed and maintained a frivolous complaint on behalf of their clients (the "Offending Complaint"). Joint Petition For Writ Of Certiorari ("Pet.Cert."), Appendix ("Appx.") 21, at A92. The Petitioners also contend that the District Court judge and one of the appellate judges improperly failed to recuse themselves. *Id.* (All references in this brief are to the Pet.Cert.), at 9-12. However, the Petitioners do not raise any new or unsettled issues of law. Instead, the Petition argues facts unsupported by the record and insinuates a vast conspiracy of state and federal judges, lawyers, and financial institutions against the Petitioners. The Petition is as frivolous as the Offending Complaint that led to the award of sanctions against the Petitioners in the first place.

A. The Underlying State Court Action

The Petitioners' description of the "underlying lender liability dispute," *id.* at 2-4, is improper and without support in the record. The record shows that the Respondent Bank of Hawaii (the "Bank") had sued one Dr. Kunimoto ("Kunimoto") in a Hawaii State Court to collect certain loans (the "State Action"). *Id.*, Appx. at A12, A15-A17 (¶¶ 1 and 11-19 of the Complaint subsequently filed by the Petitioners on behalf of Kunimoto in the United States District Court for the District of Hawaii) (the Offending Complaint). In State Action, Kunimoto asserted various "lender liability" counterclaims, which were

rejected and a judgment was eventually entered against Kunimoto for the amount due and owing to the Bank, and also in favor of the Bank and against Kunimoto and other defendants on the Bank's claims alleging fraudulent transfers by Kunimoto. *Id.* at A21-A22 (¶¶ 39 and 41 of the Offending Complaint) and Appx. 9 (Order dismissing the Offending Complaint) at A33.

The Petitioners' contentions that the State Court judge was biased and should have been disqualified, *id.* at 3, are improper and malicious. The judgment against Kunimoto in the State Action is not on review before this Court. The refusal of the State Court judge to recuse herself likewise is not before this Court. The Petitioners cannot be allowed now to collaterally attack the final judgment, or any of the rulings made in the State Action.

The record further reflects that Kunimoto declared bankruptcy in the middle of the State Court trial, and that the Bankruptcy Court appointed a Trustee for Kunimoto's bankruptcy estate. *Id.*, A22-A23 (¶¶ 42-43 of the Federal Complaint). The Petitioners imply that the Trustee (Candon) improperly declined to do what the Petitioners wanted him to do, i.e., to relitigate the State Court action in the United States District Court. *Id.* at 4. However, the conduct of the Trustee is not before this Court. The Petitioners had ample opportunity to challenge the Trustee's conduct before the Bankruptcy Court. The Petitioners do not claim that any successful challenge was made, and a collateral attack by insinuation should not be countenanced by this Court.

The Petitioners correctly state that when they filed the offending Complaint on behalf of Kunimoto and his wife in the United States District Court, it was dismissed

for lack of standing. *Id.* at 4. The District Court also found that filing of the Offending Complaint was an improper attempt to relitigate the issues decided in the State Court action. *Id.* at A64. Sanctions against the Petitioners were awarded under Fed. R. Civ. P. 11 for having filed the Offending Complaint. *Id.* at A62-69, A184. The Court of Appeals affirmed the award and the amount of sanctions. *Id.* at A192-A198.

B. The Award of Sanctions

1. The Petitioners never withdrew the Offending Complaint

The Petitioners contend that they had offered to dismiss the Offending Complaint without prejudice, and that therefore they were immune from sanctions for a frivolous filing pursuant to Fed. R. Civ. P. 11(c)(1)(A). *Id.* at 5-6. However, the District Court found that the Petitioners made only a conditional offer to dismiss the offending Complaint without prejudice only if the Bank agreed to dismiss its nondischargeability complaint against Kunimoto in the bankruptcy proceedings, and that the Petitioners never circulated a dismissal stipulation or moved for a voluntary dismissal under Fed. R. Civ. P. 41(a)(2). *Id.* at A67.

Therefore, this is not a case where the record would support a resolution by this Court of the question of law whether an actual voluntary dismissal without prejudice can suffice to bring the pleader within the "safe harbor" of Fed. R. Civ. P. 11. The Offending Complaint was never withdrawn, and the District Court found that the Petitioners' conditional offer to withdraw the Offending Complaint

in return for the Bank's dropping of the nondischargeability complaint was "a negotiating tactic designed to maintain leverage against the [Petitioners] in order to achieve a settlement." *Id.* at A67.

The Court of Appeals agreed with the District Court, noting that the Petitioners' "alleged offers were not sincere proposals but rather disingenuous attempts to force settlement." *Id.* at A196. Accordingly, on this record there is no generally applicable question of law for this Court to decide, but merely a question of whether the District Court had properly exercised its discretion upon the specific facts of this case.

2. The proceedings to determine the amount of sanctions

The Petitioners complain of an allegedly "highly abbreviated" hearing in which they had "little time" to object to the Bank's request for attorneys' fees and costs. *Id.* at 7. This is a gross misrepresentation of the record. The proceedings for assessment of the amount of sanctions lasted from December 7, 1998 until January 18, 2000, i.e., more than one full year. *Id.* at A62-A69 and A184. The Petitioners were given ample opportunity to brief their position on the issues of the award and the amount of sanctions, and they filed numerous memoranda and motions opposing various aspects of the sanctions. *Id.* Appx. 17 (Report of Special Master) at A162 (referencing [Petitioners'] Joint Notice of Objections filed July 14, 1999, and [Petitioner] Gregg Young's Memorandum In Opposition To The Fees Requested by [Respondent] Bank Of Hawaii and John Candon filed August 28, 1999), A163

(referencing the Petitioners' repeated motions to reconsider and extend time for their opposition to the fee requests), A164-A165 (referencing further papers filed by the Petitioners).

The Magistrate Judge devoted two hearings, for a total of four hours, to the amount of sanctions, and directed all parties to submit 15-page post-hearing memoranda. *Id.*, Appx. 17 at A164. The Magistrate Judge then issued a long report addressing the claims for fees and costs and the Petitioners' objections in great and excruciating detail. *Id.*, Appx. 17 at A158-A183. The Petitioners further pursued their objections to the Magistrate Judge and his report with the District Judge. *Id.* at A184 (referring to some of the Petitioners' objections). It is no wonder that the Court Appeals found that "[i]n fact, the appointment of a special master and the evidentiary hearings comprised more process than what was required." *Id.*, Appx. 21 at A197.

In sum, the record shows the Petitioners had briefed their objections to the award and amount of sanctions at great and painful length, and that substantial evidentiary hearings on the amount of sanctions were held. The Petitioners' contentions regarding the alleged general unfairness of the proceeding, such as their claim that the Magistrate Judge who was designated as a special master was being considered for reappointment at the time and therefore his independence from the influence of the District Judge was questionable, *id.* at 7, are plainly contrived.

C. The Petitioners' Claims of Error by the Magistrate Judge

The Petitioners identify eight specific alleged errors by the Magistrate Judge, each of which they claim amounted to a disregard of the law and fairness. *Id.* at 7-9. As discussed below, the Petitioners' assignments of error misrepresent the record and argue facts.

1. Award of all fees incurred since the filing of the Offending Complaint

The Petitioners contend that the Magistrate Judge improperly prohibited them from briefing "the relevant legal issues as to the permissible amount of Rule 11 sanctions awardable." *Id.* at 7. This is not true, because the Magistrate Judge invited and considered voluminous memoranda submitted by the Petitioners regarding the amount of sanctions. *Id.*, Appx. 17 at A162-A165. *See* discussion in subsection **I.B.2** above. However, the Magistrate Judge declined to entertain the Petitioners' argument that the Bank of Hawaii should only be awarded that part of its attorneys' fees incurred in connection with presenting the defense of the lack of standing, because that issue had already been argued before Judge Ezra, who ruled that the Bank of Hawaii was entitled to recover all fees "for the entire action" commenced by the filing of the Offending Complaint, i.e., including the fees incurred in the proceedings to determine the sanctions. *Id.* at A162.

Judge Ezra's ruling was based on Fed. R. Civ. P. 11 and the controlling precedent, and was affirmed as such by the Court of Appeals. *Id.*, Appx. 21 at A197. The fact that the Petitioners do not agree with the interpretation of Rule 11 by the Court of Appeals and its application by the

District Court does not mean that the District Court and the Magistrate Judge acted in disregard of the law or unfairly to the Petitioners. To the contrary, the record shows that the District Judge and the Magistrate Judge followed the precedent binding upon them.

2. The Petitioners' ability to pay sanctions

The Petitioners contend that the Magistrate Judge refused and failed to consider their evidence of inability to pay any sanctions. *Id.* at 7. However, the Magistrate Judge found that the Petitioners provided no information regarding their assets, and that therefore they failed to introduce evidence probative of their ability to pay sanctions. *Id.*, Appx. 17 at A169. The Court of Appeals agreed with the Magistrate Judge. *Id.*, Appx. 21 at A197. The record shows that the Magistrate Judge did not disregard the law, but instead that the Petitioners' litigation tactics backfired on them.

3. *In camera* inspection of the unredacted billing records

The Petitioners contend that the Magistrate Judge refused to allow them to obtain and review unredacted billing records of the Bank's counsel. *Id.* at 7-8. However, as the Magistrate Judge noted in his Report, it was Petitioner Dubin who first suggested that the Magistrate Dubin conduct an *in camera* review of those billing records to determine whether the redacted parts evidence any "dishonesty" by the Bank's counsel that was alleged by Dubin. *Id.*, Appx. 17 at A164-A165. No dishonesty of any sort was found, and the Petitioners cannot be heard now to

complain that the Magistrate Judge did what they had asked him to do.

In any event, the Magistrate Judge found that the vast majority of the redacted items from counsel's invoices was for work unrelated to this case, and therefore the redactions were proper and necessary. *Id.* at A180-A181. Clearly, the Bank would not and did not ask the Court to award fees that the counsel charged for working on other Bank matters, but which were billed in the same invoice, as a part of sanctions against the Petitioners. Likewise, the Petitioners had no conceivable right to see the Bank's counsel's billings in unrelated matters. The record shows no disregard of the law or any unfairness by the Magistrate Judge, but instead shows that he found facts and reached conclusions the Petitioners did not like.

4. Determinations made on the basis of the unseen billing entries

The Petitioners claim that the Magistrate Judge based his determination of the appropriate amount of fees awardable to the Bank upon the billing entries by the Bank's counsel that were redacted before their production and which the Petitioners were never allowed to see. *Id.* at 8. However, the Magistrate Judge found that "a vast majority" of the redacted items was properly excluded because those billings were unrelated to this case. *Id.*, Appx. 17, at A181. As to the remaining redacted items, an issue of apportionment arose in those instances where there was only total time noted for the performance of the tasks for which an award was sought and for those that were redacted and no award was sought. *Id.* at A180. The Magistrate Judge stated that he followed the rule that

"Where the documentation of the hours is inadequate, or where the hours expended were unnecessary or excessive, the appropriate remedy for this Court is to eliminate or reduce the hours expended," and that where he could not reasonably apportion the time, he reduced the award accordingly. *Id.* at A180-A182. In doing so, the Magistrate Judge plainly did not disregard of the law or act unfairly, but exercised judicial discretion.

5. Award of fees for work on issues other than the lack of standing

This is a part of the same argument discussed in subsection **I.C.1** above.

6. Award of fees for procedural work in pursuit of sanctions

This is yet another part of the same argument discussed in subsection **I.C.1** above.

7. The transcript and exhibits of "Rule 53 hearings"

The Petitioners claim that the Magistrate Judge did not file a transcript of the hearings that he conducted or the exhibits introduced at the hearings as required by Fed. R. Civ. P. 53. *Id.* at 9. This is a red herring. Fed. R. Civ. P. 53(f) provides that a Magistrate Judge is subject to the procedural requirements of Rule 53 only if the order referring the matter to the Magistrate Judge expressly provides that the reference is made under Rule 53. In this instance, the order referring the matter to the Magistrate Judge did not invoke Rule 53. *Id.*, Appx. 11 at A68-A69.

Therefore, Rule 53 never applied to these hearings. In any event, the Petitioners had ample opportunity to obtain and designate the transcript of the hearings before the Magistrate Judge as a part of the record before the District Court and on appeal, but they instead chose to complain. In sum, the Petitioners' arguments are pointless and moot.

8. Determinations made on the basis of the unseen billing entries

This is a rehash of the arguments discussed in subsections **I.C.3** and **I.C.4** above.

D. The Recusal Motions

The Petitioners argue that District Judge Ezra and Circuit Judge O'Scannlain improperly failed to recuse themselves in this case. This argument must be taken in the context of the Petitioners' other contentions that (1) the State Court judge in the underlying case was biased because the Bank allegedly gave her a sweetheart mortgage, *id.* at 3; (2) the Magistrate Judge in Rule 53 proceeding was under consideration for retention and therefore was under particular influence of Judge Ezra, *id.* at 7; (3) District Judge Real "hand-picked" Petitioner Gary Victor Dubin's ("Dubin") tax evasion case and improperly had him convicted and incarcerated, *id.* at 11; (4) Circuit Judge Poole was senile, *id.* at 11; and (5) District Judge Ezra was "badmouthing" Dubin to the Chief Circuit Judge Wallace, *id.* at 11 and A187-A188. Of course, these contentions have no support in the record.

The Petitioners' consistent litigation tactics are to claim that each and every judge, state or federal, trial or appellate, who does not act to their liking, is biased

against them and should be recused or disqualified. The Petitioners' habit of personally attacking every judge in sight, and the opposing parties and counsel as well, is revolting. *Id.* at A18-A19 (allegations that the Bank and its counsel improperly "permeate every institution and aspect of governance" in the State of Hawaii), A21-A22 (allegations that the Bank bribed the State judge in the underlying State Action). The Petitioners' recusal arguments are frivolous on their face.

II. PETITIONERS DO NOT RAISE AN ISSUE OF LAW DESERVING REVIEW

The issues on which the Petitioners seek review here argue facts, involve legal points that are well settled within our Circuit and as to which there is no conflict with decisions of other Courts of Appeals, or are plainly contrived. None of those "issues" deserve further review.

A. Kunimoto's Lack of Standing to Bring the Offending Complaint

The Petitioners argue that Kunimoto's lack of standing to bring a suit on behalf of his bankruptcy estate without the Trustee's consent was debatable. *Id.* at 14-16. The Court of Appeals disagreed and held that the law was settled, and that the Petitioners' claim of Kunimoto's standing was not "colorable." *Id.*, Appx. 21 at A193-A195. The Petitioners have failed to demonstrate that this ruling conflicts with any ruling by any other Court of Appeals.

In any event, this case is a singularly inappropriate vehicle for this Court to undertake a review of debtor's standing to bring suits on behalf of his bankruptcy estate.

It is clear, and two Courts have so found, that the Petitioners were engaged in an improper effort to have a judgment of the Hawaii State Court reviewed and relitigated in the United States District Court for the District of Hawaii. Thus the District Court wrote that "most of Plaintiffs' claims re-allege issues which have already been adjudicated by the state court in Defendants' favor and are therefore barred by the doctrines of res judicata and collateral estoppel," *Id.*, Appx. 11 at A64, and the Court of Appeals wrote that "The complaints largely repeated claims that had been settled in state court." *Id.*, Appx. 21 at A196. Therefore, in addition to the lack of standing, the Offending Complaint is also barred by the doctrines of res judicata and collateral estoppel, as well as by the doctrine of *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16, 44 S.Ct. 149, 68 L.Ed. 362 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983) (precluding federal court jurisdiction where claims are inextricably intertwined with a state court decision in a particular case).

B. Evidentiary Support of the Award of Sanctions

The Petitioners argue that District Judge Ezra improperly based his decision to award sanctions on their alleged misconduct unrelated to this case. *Id.* at 16-17. This is a baseless insinuation. The gratuitous but well-intended remarks by Judge Ezra suggesting to Petitioner Dubin to reconsider his general approach to litigation, to which the Petitioners refer, are not material to the award of sanctions. The record amply supports the award of sanctions *for the Petitioners' conduct in this action*, which two Courts found was intended to harass the Bank and

relitigate claims decided in the State Court. *Id.*, Appx. 11 at A64 ("filed for the improper purpose of harassing and pressuring Defendants to settle other pending litigation"), *Id.*, Appx. 21 at A196 ("a strategy of harassment"). *See also* discussion in subsection **II.A** above.

C. Judge Ezra's Refusal to Recuse Himself

The Petitioners argue that Judge Ezra should have recused himself because Petitioner Dubin had once raised a malpractice claim against Ezra, who was then in private practice, and his firm. *Id.* at 18-19. The Court of Appeals characterized the Petitioners' motions to disqualify Judge Ezra and the Magistrate Judge as a part and parcel of the Petitioners' "strategy of harassment." *Id.*, Appx. 21 at A196. This Court certainly should not countenance such a strategy, and no District Judge should be put in a position where he could be bullied into recusal by abusive litigants.

D. Rule 11 "Safe Harbor"

The Petitioners argue that this Court should hold that a dismissal without prejudice of a baseless pleading should immunize one from sanctions under the current language of Fed. R. Civ. P. 11. As previously discussed, this is not an appropriate case to decide this question, because the Petitioners never withdrew the Offending Complaint and only made a conditional offer to dismiss it without prejudice if the Bank made other concessions. *See* discussion in subsection **I.B.1** above.

E. The Extent to Which the Bank Was Entitled to Pursue Dismissal and Sanctions

The Petitioners argue that this Court should hold that the Bank and its counsel should have spent less effort in pursuing the dismissal of the Offending Complaint and an award of sanctions against the Petitioners. *Id.* at 23-24. In effect, the Petitioners ask this Court to engage in a detailed factfinding to determine whether the Bank at any point exceeded some hypothetical absolute minimum of effort sufficient to counter harassment and unfair litigation tactics employed by the Petitioners at each stage of the proceedings in this action.

It is disingenuous for the Petitioners to complain about the amount of fees incurred by the Bank in prosecuting its request for sanctions. It was the Petitioners' own choice to mount a scorched earth defense to the request for sanctions, including repeated motions for reconsideration of almost every order entered, and for disqualification of the District Judge and the Magistrate Judge. *Id.*, Appx. 21 at A196. Likewise, it was the Petitioners' own choice to fight the request for sanctions for their frivolous conduct by asserting increasingly frivolous defenses for more than one full year. In sum, the Petitioners fail to raise an issue of law deserving of review.

F. The Alleged "Block Billing"

The Petitioners argue that the fees were improperly awarded for "block billed" entries in the Bank's counsel's invoices. *Id.* at 24-25. This argument fails to raise a legal issue, because the Court of Appeals expressly found that the Magistrate Judge had conducted a line-by-line review of the time records and reduced time entries wherever

there was any doubt as to how time should have been apportioned between different tasks. *Id.*, Appx. 21 at A197. *See also* discussion in subsections **I.C.3** and **I.C.4** above. Apparently the Petitioners expect this Court to repeat the line-by-line review to verify that the Magistrate Judge actually did what the Court of Appeals said he did.

G. The *In Camera* Review of the Bank's Counsel's Billing Records

The Petitioners argue that the Magistrate Judge had improperly reviewed the unredacted billing records by the Bank of Hawaii's counsel *in camera*. *Id.* at 25-26. As discussed in subsections **I.C.3** and **I.C.4** above, the in camera review was initially requested by the Petitioners, so that the Magistrate Judge can verify that there was no dishonesty involved in redacting of these records. Then, as discussed in subsection **II.F** above, the Magistrate Judge conducted a line-by-line review of the redacted and unredacted time records and reduced time entries wherever there was any doubt as to how time should have been apportioned between different tasks. Therefore, no legal issue arises as to the appropriateness of the Magistrate Judge's actions. The Petitioners disagree with the Magistrate Judge's findings and conclusions, but those clearly were within his discretion.

H. The Rule 53 "Issue"

The Petitioners argue that this Court should hold that the Magistrate Judge violated the procedural requirements of Fed. R. Civ. P. 53. *Id.* at 26. However, as discussed in subsection **I.C.7** above, the Magistrate Judge was not subject to the Rule 53 requirements, and in any

event the Petitioners had ample opportunity to obtain transcripts of the hearings. The Petitioners' arguments regarding Rule 53 are moot.

I. The Petitioners' Ability to Pay

The Petitioners argue that this Court should hold that the Magistrate Judge, in assessing the amount of sanctions, improperly failed to consider their ability to pay. *Id.* at 26-29. However, as discussed in subsection **I.C.2** above, the Magistrate Judge found that the Petitioners failed to provide any evidence regarding their assets. Therefore, there is no legal issue before this Court regarding the Petitioners' ability to pay sanctions. Clearly the Magistrate Judge could not review the evidence which the Petitioners chose not to introduce.

J. The Refusal of Circuit Judge O'Scannlain to Recuse Himself

The Petitioners argue that Circuit Judge O'Scannlain should have recused himself because he sat on a panel that affirmed Petitioner Dubin's criminal conviction for tax evasion. *Id.* at 29-30. As discussed in subsection **I.D**, the Petitioners' incessant motions for recusal and disqualification of all judges in their sight constitute a singular "signature" of their abusive litigation style. This is a patently contrived claim and the same comments as set forth in subsection **II.C**, regarding District Judge Ezra's refusal to recuse himself, apply here.

III. CONCLUSION

It is difficult to find a case where sanctions against abusive litigation tactics were more compellingly necessary than here. The Petitioners' filing of the Offending Complaint, which attempted to reopen and relitigate a case decided in the State Court, was plainly frivolous and cried for sanctions. In the process of fighting sanctions, the Petitioners continued their abusive and harassing conduct by, among other things, filing motions to recuse judges, filing repeated motions to reconsider, and generally trying to outlast the Bank in a grand battle of attrition. The Petitioners lost their battle, and have only themselves to blame for the consequences and the ultimate cost.

The Petition does not raise a single issue of law that would deserve this Court's attention. It is replete with disturbing personal attacks against the Bank, its counsel and all judges involved in these and related, and some unrelated, proceedings. At best, the Petition asks this Court to review *de novo* the Magistrate Judge's factual determinations which he made as a Master to whom a District Judge referred the matter of assessing the amount of Rule 11 sanctions against the Petitioners. At worst, the Petition is another instance of malicious nonsense spawned by the Petitioners in their efforts to win their case by abusing the legal system. There is no conceivable reason why this Court should waste its time with this Petition and with these Petitioners, who have already

wasted an inordinate amount of time of a number of Courts below. The Petition should be denied.

Respectfully submitted,

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